GAO reasoned that "[w]hen a statute creates a right that did not exist at common law and restricts the time to enforce it, expiration of the time limit not only bars the remedy but extinguishes the underlying rights and liabilities of the parties." *Ford*, 73 Comp. Gen. at 160-161. Thus, GAO concluded, "a time limitation imposed on a statutorily created judicial cause of action will apply to administrative proceedings to adjudicate the same claims absent a specific provision to the contrary." *Id.* at 161. "[L]egislative determinations to limit the extent of a party's exposure to liability or to discourage claims involving stale facts or documentation problems are no less relevant to administrative than to judicial proceedings." *Ibid.*

GAO further explained that when Congress extended FLSA coverage to federal employees, "no congressional intent was manifested in the amending language or its underlying legislative history that federal employees would be accorded a more liberal limitations period than employees in the private sector." 73 Comp. Gen. at 160 (quoting *Hickman* v. *United States*, 10 Cl. Ct. 550, 552 (1986)). Construing the Barring Act to extend the limitations period for administrative back pay claims against the government, GAO concluded, would disserve congressional intent by "creat[ing] disparate treatment * * * between federal employees and private sector employees" who have no administrative alternative to filing a court suit for back pay. *Id.* at 161.

c. Petitioners and others persuaded Congress to grant relief from the effect of the *Ford* decision on some already-pending FLSA administrative claims. In Section 640 of the Treasury, Postal Service and General Government Appropriations Act, 1995, enacted on September 30, 1994, Congress provided:

> In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*) for claims filed before June 30, 1994.

Pub. L. No. 103-329, § 640, 108 Stat. 2432.

Invoking Section 640, petitioners contacted GAO seeking resolution of their claims. GAO reminded petitioners that their claims had to be processed first through their employing agencies. See 4 C.F.R. 31.4 (1994). Petitioners brought their claims to the attention of the employing agencies, which denied them on the ground that Section 640 by its terms authorized only the Comptroller General to apply a six-year statute of limitations. 04-1225 Pet. App. 58a.

In 1995, petitioners appealed those agency determinations to GAO. By then, however, Congress was considering repeal of Section 640. On November 19, 1995, Congress amended Section 640 as follows:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law * * *, or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468-469. The sponsor of the amendment explained that GAO's 1978 decision to apply a six-year limitations period had been "incorrect [because] the law states that everyone would only be entitled to two years" of back pay for FLSA violations. 141 Cong. Rec. 32,597 (1995) (remarks of Rep.

Lightfoot). He added that, although in *Ford* the GAO had "corrected its mistake," the 1994 legislation—which required GAO to allow up to six years of back pay for claims that had already been filed by June 30, 1994—would cost the government as much as $460 million, "nearly the entire Secret Service budget." *Ibid.* "The conferees were faced with a choice—either pay hundreds of millions for work done many years ago and fire four or five thousand employees[,] or give the Federal workers the same rights as their private sector counterparts." *Ibid.* Therefore, "we included language providing for the same treatment for public and private workers * * * not just because [to do otherwise] costs a lot of money, but because it is fair." *Ibid.*

GAO applied amended Section 640 in the pending case in which petitioners had intervened. *In re Atkinson*, No. B-256938, 1996 WL 31212 (Comp. Gen. Jan. 29, 1996). GAO then advised petitioners in March 1996 that it would similarly adjudicate their FLSA claims in accordance with amended Section 640.

3. Petitioners brought this action in the district court in October 1995—before passage of the amendment to Section 640 and before GAO's decision in *Atkinson* —seeking mandamus, injunctive, and declaratory relief requiring GAO to apply a six-year statute of limitations to their claims notwithstanding *Ford*. 04-1225 Pet. App. 60a. In supplemental complaints, petitioners added challenges to amended Section 640 and *Atkinson*. *Ibid.*

a. The district court granted the government's motion for summary judgment. 04-1225 Pet. App. 74a-90a. The court held that petitioners' pending administrative claims did not constitute separate "property" rights entitling them to demand application of the pre-*Ford* interpretation of the law because a cause of action is "inchoate, and affords no definite or enforceable property right until reduced to final

judgment." *Id.* at 79a (quoting *Austin* v. *City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988)). The court also held that petitioners had no enforceable property interest in their "earned but unpaid FLSA overtime compensation." *Id.* at 80a. "[T]he FLSA," it explained, "is a creature of statute and can only confer benefits contained within the statute," and "there was nothing in the legislative record [of the FLSA] indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector." *Id.* at 80a, 81a. Indeed, "[u]ntil the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims," and its past practice of doing so was simply "wrong." *Id.* at 81a.

The district court added that those petitioners who had filed administrative claims before June 30, 1994 had derived "property interests in their unpaid overtime compensation" from the enactment of Section 640. 04-1225 Pet. App. 82a. The court concluded, however, that those petitioners are not entitled to relief, because such interests could be extinguished consistent with the Due Process Clause by economic legislation having "a legitimate legislative purpose furthered by rational means." *Ibid.* (quoting *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992)). The court found that the amendment to Section 640 met that standard. *Id.* at 82a-83a.

For similar reasons, the district court held that petitioners had identified no unconstitutional taking. 04-1225 Pet. App. 85a-87a.

b. Except on the takings issue, the D.C. Circuit affirmed "substantially for the reasons stated in the [district] court's thorough and well-reasoned opinion." 04-1225 Pet. App. 60a. The court of appeals determined that "the usual remedy for unconstitutional takings is a suit for

money damage (*i.e.*, the 'just compensation' that the Constitution assures) either under the Tucker Act in the CFC, 28 U.S.C. 1491," or if the amount in controversy is less than $10,000, in the district court under the Little Tucker Act, 28 U.S.C. 1346(a)(2). 04-1225 Pet. App. 63a (citations and footnote omitted). Either way, the D.C. Circuit concluded, exclusive appellate jurisdiction would lie in the Federal Circuit. *Ibid.*

This Court denied petitioners' petition for a writ of certiorari. 526 U.S. 1158 (1999).

4. a. On remand, the district court transferred this case to the CFC, which dismissed the takings claims. 04-1225 Pet. App. 25a-51a, 52a. The CFC concluded that govern-mental obligations to pay money pursuant to a statute do not give rise to a protected property interest for purposes of the Takings Clause. *Id.* at 26a, 36a-48a. Because "[a]ll the plaintiffs have identified is a run-of-the-mill claim for liability," their "claim does not fall under the safeguard of the Takings Clause, but is at best a due process claim to secure an alleged entitlement," a claim that the D.C. Circuit had rejected. *Id.* at 41a, 48a.

The CFC likewise rejected petitioners' alternative argument that the amendments to Section 640 were a taking of their cause of action under the FLSA. 04-1225 Pet. App. 48a-50a. "While it is true that in certain circumstances abolition of a cause-of-action can rise to a level of an unconstitutional taking * * * it is equally true that [petitioners'] cause-of-action must secure a cognizable 'legally protected interest.'" *Id.* at 50a. Here, the court reasoned, petitioners' claim for overtime payment is not a property right protected by the Takings Clause. *Ibid.*

b. The Federal Circuit affirmed. 04-1225 Pet. App. 1a-24a. The court rejected petitioners' contention that they own a Fifth Amendment property interest under the

FLSA, stating that petitioners "confuse a property right cognizable under the Takings Clause of the Fifth Amendment with a due process right to payment of a monetary entitlement under a compensation statute." *Id.* at 12a. The court likewise rejected the argument that petitioners' right to FLSA overtime payment became a vested contractual right once the work was completed, noting that the terms of petitioners' employment are governed by statute rather than by any express or implied contract. *Id.* at 14a. Nor, the court reasoned, is the government's statutory obligation to pay overtime a "debt" evidenced in a legal instrument; petitioners "have nothing more than a bald allegation that they are owed underpaid overtime compensation by the Government." *Id.* at 17a. The court also reaffirmed its holding in *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327 (Fed. Cir. 2001) (en banc), cert. denied, 535 U.S. 1096 (2002), that the mere imposition of an obligation to pay money does not give rise to a takings claim. 04-1225 Pet. App. 19a-22a.

Finally, the Federal Circuit rejected petitioners' claim that Congress's amendment of Section 640 in 1995 effected a *per se* taking of their GAO administrative claim. The court explained that a cause of action may constitute property for purposes of the Takings Clause only when "the cause of action protects a legally-cognizable property interest." 04-1225 Pet. App. 23a. Petitioners "have not cited any precedent finding such a property interest in a claim of Government liability before an administrative agency." *Ibid.*

DISCUSSION

Petitioners assert (04-1225 Pet. 12-28; 04-1226 Pet. 14-25) that the Federal Circuit erred in holding that the 1995 legislation does not violate the Takings Clause, and that the

D.C. Circuit erred in holding that the legislation does not violate the Due Process Clause. The courts of appeals' decisions are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. Thus, a fundamental precondition to any takings claim is the taking of "property." See, *e.g.*, *United States* v. *Security Indus. Bank*, 459 U.S. 70, 75 (1982). Such "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)).

The Federal Circuit correctly held that petitioners have no cognizable property interest for purposes of the Takings Clause. 04-1225 Pet. App. 10a-24a. After petitioners performed the work at issue, and after petitioners filed their administrative and judicial claims, Congress retroactively extended the statute of limitations applicable to their administrative claims from two to six years. Treasury, Postal Service and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 640, 108 Stat. 2432. The following year, Congress retroactively repealed that retroactive extension as applied to employees who had already received some form of overtime compensation for the work at issue. Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468-469. Because petitioners did not possess a property right in the retroactively extended statute of limitations for administrative claims, the withdrawal of that

extension did not take any of their property for purposes of the Takings Clause.

a. Although petitioners argue correctly that a contract with the United States can create a property right, see 04-1225 Pet. 13 (citing *Perry* v. *United States*, 294 U.S. 330 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934)), petitioners have no relevant contract rights. Petitioners contend (04-1225 Pet. 12) that they have a contractual right to their "earned wages," but that contention is both wrong and irrelevant. It is wrong because the employment relationship between the federal government and its employees is governed by statute, not contract. And it is irrelevant because Congress did not divest petitioners of their right to earned wages; instead, it merely reinstated the same statutory limitations period for administrative claims that had been in effect at the time that petitioners performed the relevant work and filed their claims.

i. It is well settled that "federal employment does not rest on contract in the private sector sense." *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 535 (1989). As the Federal Circuit explained:

> [F]ederal workers serve by appointment, and their rights are therefore a matter of legal status even where compacts are made. In other words, their entitlement to pay and other benefits must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles. * * * Applying these doctrines, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel. These cases have involved, *inter alia*, promises of appointment to a particular grade or step level, promises of promotion upon satis-

> faction of certain conditions, promises of extra compensation in exchange for extra services, and promises of other employment benefits.

04-1225 Pet. App. 14a-15a (quoting *Kizas* v. *Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984)); see, *e.g.*, *Schism* v. *United States*, 316 F.3d 1259, 1268, 1271, 1275-1275 (Fed. Cir. 2002) (en banc), cert. denied, 539 U.S. 910 (2003); *Kizas*, 707 F.2d at 535 (citing numerous cases). Instead of "transform[ing] the basic relationship between the United States and its" employees, as petitioners claim (04-1225 Pet. 12), the decision below therefore rests on established principles concerning that relationship. As federal employees, petitioners can have no contractual right to FLSA overtime compensation.

Indeed, petitioners can point to *no* contractual document that could even arguably give rise to such a right. As the Federal Circuit noted, "[t]he only legal instrument, the Form 50, rather than acknowledging [petitioners'] right to be paid for overtime at the rate specified in the FLSA, instead indicated that the FLSA did *not* apply to them." 04-1225 Pet. App. 17a (emphasis added).

Petitioners rely heavily (04-1225 Pet. 15) on *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885), which held that a local government had violated the Contracts Clause of the United States Constitution by not paying a district attorney money that he was concededly owed for his services. The Court reasoned that an "implied contract" arose between the locality and the employee because "[n]ot only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury." *Id.* at 134.

Petitioners' reliance on *Fisk* is misplaced for a number of reasons. As the court of appeals noted (04-1225 Pet. App. 14a), *Fisk* involved a local government employee's rights

under the Contracts Clause, not a federal employee's rights under the Takings Clause. Because the federal employment relationship is governed by statute, not contract, principles governing implied-in-fact contracts apply differently to the federal government. See pp. 12-13, *supra*; *Schism*, 316 F.3d at 1274; *Kizas*, 707 F.2d at 535 & nn.51-54 (citing cases).

Moreover, in *Fisk*, liability and damages had been determined, and the only question was whether the Contracts Clause applied and required the locality to levy a tax to pay the wages. 116 U.S. at 134-135. In contrast, the government has always disputed petitioners' right to FLSA compensation, and petitioners' claims still have not been resolved. Especially in this posture, there is no basis for converting petitioners' statutory claims for compensation into constitutional takings claims.

United States v. *Larionoff*, 431 U.S. 864 (1977), is inapposite for similar reasons. *Larinoff* considered the validity, under a statute, of administrative regulations that interpreted that statute to deny a re-enlistment bonus to a service member even though the bonus had been in effect at the time the service member signed a written re-enlistment agreement. *Id.* at 873. As the Federal Circuit and the CFC both noted, *Larionoff* is inapposite because it involved the interpretation of a statutory entitlement to compensation, not the assertion of a claim under the Takings Clause. 04-1225 Pet. App. 12a, 45a. Although *Larinoff* also noted that "serious constitutional questions would be presented" by a statute that deprived a service member of pay for services already performed (431 U.S. at 879), that statement is hardly a definitive resolution of the constitutional issue in this case. Indeed, the Court did not even refer to the Takings Clause. And like *Fink*, *Larinoff*

addressed a specific, known liability that turned only on the statutory issue addressed by the Court.

ii. In any event, while *Fink* and *Larinoff* addressed employees' rights to *compensation*, this case involves a *statute of limitations* for administrative claims. Although petitioners repeatedly contend (*e.g.*, 04-1225 Pet. 2-3; 04-1226 Pet. 25) that Congress repudiated its debts, and deprived them of compensation for work already performed, it did no such thing. Congress did not repeal the FLSA. Nor did it impair in any way petitioners' ability to pursue judicial remedies. Indeed, petitioners have pursued their judicial remedies with no interference from Congress. See generally p. 4, *supra*.

Instead, this case involves only a statute of limitations for an additional administrative claim avenue open only to government employees, and even that statutory limitations period is the same now as it was when petitioners performed the relevant work and filed their claims. It bears emphasis that the sole basis for petitioners' takings claim is that *after* petitioners performed the work at issue, and *after* petitioners filed their judicial and administrative claims, Congress first enacted a retroactive extension of the limitations period for administrative claims, and then enacted a partial repeal of that retroactive extension for employees who had already received overtime compensation for the work at issue. See, *e.g.*, 04-1225 Pet. 3 (relying on the amendment to Section 640). Taken together, those two statutes had no effect on petitioners' primary conduct and left petitioners no worse off (and in some respects better off) than when they performed the relevant work and filed their claims.[1]

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[1] Although petitioners challenged GAO's reconsideration of the appropriate limitations period in their prior petition for a writ of

Thus, even if petitioners had somehow obtained vested contract rights at the time they completed the relevant work, those vested rights would not have included Section 640's *subsequent* extension of the limitations period for administrative claims. That statute had not yet been enacted, and there are no vested rights in subsequently-conferred windfalls. In that respect, Section 640 is indistinguishable from other government benefits, such as social security benefits, that do not create vested property rights and are therefore subject to legislative repeal. See, *e.g.*, *Flemming* v. *Nestor*, 363 U.S. 603, 608 (1960) (holding that termination of social security benefits did not deprive petitioner of an accrued property interest).

b. i. In addition to asserting a contractual entitlement, petitioners contend (04-1225 Pet. 18-23) that a statutory right to compensation can give rise to a cognizable property interest. That contention fails because nothing in the statutory text evinces an intent to confer property rights. "For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-466 (1985) (quoting *Dodge* v. *Board of Educ.*, 302 U.S. 74, 79

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certiorari in this case (see Gov't Br. in Opp. at 22-23 & n.12, *Adams* v. *Hinchman*, No. 98-1265), the current petitions rely only on *Congress's* changes to the administrative statute of limitations. See, *e.g.*, 04-1225 Pet. 3. In any event, GAO's overruling of its prior interpretation of the Barring Act could not give rise to a takings claim because petitioners have no property interest in any particular construction of a statute. See pp. 20-21, *infra*. Moreover, GAO's current interpretation is the correct one. See 04-1225 Pet. App. 81a; *id.* at 61a; p. 5, *supra*.

(1937)). In determining whether a statute "clearly and unequivocally" overcomes that presumption, "it is of first importance to examine the language of the statute." *Id.* at 466 (quoting *Dodge*, 302 U.S. at 78).

Significantly, petitioners make no attempt to identify *any* language in *any* statute that could overcome that presumption in this case. Although petitioners base their claims on the partial repeal of Section 640, nothing in Section 640 expresses an intent by Congress to bind itself by conferring vested property rights on petitioners. Instead, that statute simply directed the Comptroller General to apply a six-year statute of limitations to certain administrative claims. See p. 6, *supra*.

ii. Instead of contesting that point, petitioners criticize various aspects of the court of appeals' reasoning. Those criticisms are misplaced. Petitioners argue (04-1225 Pet. 22-23) that the Federal Circuit erred in *another* case, *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1340 (2001) (en banc), cert. denied, 535 U.S. 1096 (2002), which held that "the mere imposition of an obligation to pay money * * * does not give rise to a claim under the takings Clause of the Fifth Amendment." That holding is correct. As this Court explained in *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), "[u]nlike real or personal property, money is fungible," and taxes and other government exactions might be considered takings if the mere imposition of an obligation to pay money, without more, implicated the Takings Clause.

As the court of appeals noted (04-1225 Pet. App. 19a-20a), a majority of this Court reiterated that conclusion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), by determining that a mere obligation to pay an undifferentiated amount of money, not drawn from a specific identifiable fund, is not property for purposes of the Takings

Clause. *Id.* at 540-542 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554-557 (Breyer, J., dissenting).[2] Although petitioners fault the Federal Circuit for "[t]allying votes from concurring and dissenting opinions" (04-1225 Pet. 22), that misses the point. *Commonwealth Edison* did not treat *Eastern Enterprises* as a change in the law; nor did it rely exclusively on *Eastern Enterprises*. Instead, the Federal Circuit also relied on this Court's decision in *Sperry*, *supra*, and the Federal Circuit's own decision in *Atlas Corp.* v. *United States*, 895 F.2d 745, 756, cert. denied, 498 U.S. 811 (1990), which had held that "[r]equiring money to be spent is not a taking of property." *Commonwealth Edison*, 271 F.3d at 1340.

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[2] The takings issue in this case is not distinguishable from *Eastern Enterprises* on the basis, asserted by petitioners (04-1225 Pet. 23), that *Eastern Enterprises* involved a private party's obligation to another private party, whereas this case involves an obligation to pay money by the government. Justice Kennedy expressly rejected the relevance of that point in *Eastern Enterprises*: "The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking." 524 U.S. at 543 (Kennedy, J., concurring in judgment and dissenting in part). The four other Justices who agreed that no valid taking claim was raised in *Eastern Enterprises* did remark that the case involved an obligation to pay money to a private party. See *id.* at 555 (Breyer, J., dissenting). They also observed, however, that one of the reasons that the monetary obligation in *Eastern Enterprises* should not be conceptualized as a taking is that such a characterization might lead to the conclusion that all taxes could be considered takings. See *id.* at 556 (Breyer, J., dissenting).

Nor is the relevance of *Eastern Enterprises* limited to regulatory takings, as petitioners suggest (04-1225 Pet. 20-21). The relevant portions of *Eastern Enterprises* address the question whether the plaintiff had a cognizable property interest—a threshold issue in *any* takings case. See 524 U.S. at 540-542 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting); p. 11, *supra*.

There is nothing wrong with a lower court following *both* past precedent *and* the expressed views of a majority of the Members of this Court. In any event, this Court denied certiorari in *Commonwealth Edison* (535 U.S. 1096 (2002)), and further review of that decision is no more warranted in this case than in that one. See generally Gov't Br. in Opp. at 13-15, *Sacramento Mun. Util. Dist.* v. *United States*, Nos. 01-1020, 01-1155, 01-1398 & 01-1411.

Indeed, petitioners simply misread the Federal Circuit's decision in contending (04-1225 Pet. 24) that the court held that debts are not property unless they relate to a specific "fund of money." The Federal Circuit expressly stated that *contractual* obligations are ordinarily property. 04-1225 Pet. App. 15a-16a. In the discussion relied on by petitioners, the court held that the mere imposition of an obligation to pay money does not constitute a taking of a specific interest in property, and then recognized, as had a majority of this Court in *Eastern Enterprises*, that nonetheless the seizure of a specific fund of money can constitute a taking if the fund constitutes a specific interest in property. *Id.* at 21a; *Eastern Enters.*, 524 U.S. at 555 (Breyer, J., dissenting); see *id.* at 540 (Kennedy, J., concurring in judgment and dissenting in part).

That result follows from *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies*, *supra*, which held that interest on bank deposits could not be taken without just compensation because the depositors had a property interest in their deposits, and the right to interest follows the right to principal under state property law. Those cases are of no avail to petitioners, however, because they rest on state-law property interests in the seized funds. *Phillips*, 524 U.S. at 165-167; *Webb's*, 449 U.S. at 160-161. As explained above, petitioners have no property interest of any kind in Section

640's extension of the limitations period for administrative claims.

Petitioners similarly take issue (04-1225 Pet. 22) with the Federal Circuit's determination that *Commonwealth Edison* supports its "conclu|sion| that a statutory right to be paid money, at least in the context of federal employee compensation and benefit entitlement statutes, is not a property interest for purposes of the Takings Clause." 04-1225 Pet. App. 22a. For the reasons explained above, however, the federal employment relationship is statutory, not contractual, and petitioners can point to nothing in the relevant statutes that expresses an intent to vest petitioners with property rights. See pp. 12-13, 17, *supra*.

c. For similar reasons, petitioners err in asserting (04-1225 Pet. 25-26) that their administrative claims are "property even if not yet reduced to judgment." As the Federal Circuit explained, a cause of action can provide the basis for a takings claim only when "the cause of action protects a legally-recognized property interest." 04-1225 Pet. App. 23a. Petitioners cannot generate a property interest merely by asserting a cause of action.

The reason is straightforward: although a cause of action is considered property for some purposes, "it is inchoate and affords no definite or enforceable property right until reduced to final judgment." *Austin* v. *City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988) (internal quotation marks omitted). As this Court has explained, "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Cent. R.R.* v. *White*, 243 U.S. 188, 198 (1917). Thus, new legislation—including legislation repealing a provision of law on which the plaintiff had relied—generally applies to pending cases. *Plaut* v. *Spend-thrift Farm, Inc.*, 514 U.S. 211, 226-227 (1995); *Western Union Tel. Co.* v.

Louisville & Nashville R.R., 258 U.S. 13, 22 (1922). Because petitioners have not obtained a final judgment on any of their claims, their assertion of a cause of action does not give them property rights in any particular rule of law, including any particular limitations period for their administrative claims. Indeed, as the court of appeals noted, petitioners "have not cited any precedent finding such a property interest in a claim of Government liability before an administrative agency." 04-1225 Pet. App. 23a.

d. Petitioners err in contending (04-1225 Pet. 22 n.21) that there is a relevant "circuit split over the precedential status of *Eastern Enterprises*." Petitioners contend (*ibid.*) that the Federal Circuit and the First Circuit have "held that *Eastern Enterprises* has precedential effect on Takings Clause claims," while other circuits have held that "*Eastern Enterprises* either has no precedential effect, or that its holding is limited to similarly-situated plaintiffs."

To whatever extent there is any disagreement among the lower courts about how to apply the analysis of *Marks* v. *United States*, 430 U.S. 188 (1977), to *Eastern Enterprises*, it does not provide any basis for granting these petitions. The Federal and First Circuits both relied in part, but not in whole, on *Eastern Enterprises* for principles that were already settled. As explained above, the Federal Circuit relied on *Eastern Enterprises* for the proposition, previously announced in decisions of this Court and the Federal Circuit, that the mere imposition of an obligation to pay money is not a taking. See pp. 17-18, *supra*. Similarly, the First Circuit relied on *Eastern Enterprises* and two of its own prior decisions for the proposition that "a Takings Clause issue can arise only after a plaintiff's property right has been independently established." *Parella* v. *Retirement Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1999); see *id.* at 59. That is a

bedrock proposition of settled takings jurisprudence mandated by the express text of the Takings Clause itself. See p. 11, *supra*.

There is no meaningful conflict among the circuits. No circuit has squarely held that *Eastern Enterprises* changed the law, or dictated a result that the court otherwise would not have reached. More importantly, no courts of appeals have disagreed about how to apply *Eastern Enterprises* to any particular question at issue in this case. Indeed, petitioners point to no specific difference in the courts' application of *Eastern Enterprises* to *any* issue, much less to an issue that is relevant to the disposition of this case.[3]

2. In addition to challenging the Federal Circuit's decision, petitioners assert (04-1226 Pet. 14-25; 04-1225 Pet. 27-28) that the D.C. Circuit erred in holding that the 1995 amendments do not violate the Due Process Clause. This Court previously denied a petition challenging the D.C.

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[3] The other cases cited by petitioners as the basis for the supposed circuit split involved the constitutionality of either the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. 9701 *et seq.* (the statute at issue in *Eastern Enterprises*) or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* None of those cases involved statutes of limitations, employee compensation, or alleged government contracts, and none of them held that a taking had occurred. See *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 188-190 (2d Cir. 2003) (holding that CERCLA is constitutional), cert. denied, 540 U.S. 1103 (2004); *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 550-553 (6th Cir. 2001) (same); *A.T. Massey Coal Co., Inc.* v. *Massaranti*, 305 F.3d 226, 236-241 (4th Cir. 2002) (holding that the Coal Industry Retiree Health Benefits Act of 1992 is constitutional as applied in that case), cert. denied, 538 U.S. 1012 (2003); *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 169-174 (3d Cir.) (same), cert. denied, 528 U.S. 1003 (1999); *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998) (same).

Circuit's judgment in this case (526 U.S. 1158 (1999)), and it should do so again. The D.C. Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals.

a. Petitioners argue (04-1226 Pet. 15) that every Member of this Court agreed in *Eastern Enterprises* that "the Fifth Amendment requires more from retroactive legislation than a rational basis," and instead requires "a searching inquiry into the fundamental fairness of the burdens imposed by a law." Petitioners overread the opinions in *Eastern Enterprises*.

i. As the court of appeals recognized (04-1225 Pet. App. 61a), this Court has consistently held that retroactive legislation complies with due process principles if "the retroactive application of the legislation is * * * justified by a rational legislative purpose." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); accord *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992); *Sperry*, 493 U.S. at 64; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 17-18 (1976). Indeed, even though petitioners assert that *Gray*, *Sperry*, and *Turner Elkhorn* "strongly suggest" that rationality is not the appropriate test, they ultimately concede that "[t]he test actually articulated in these cases * * * is the ordinary rational basis standard." 04-1226 Pet. 15 & n.9.

Eastern Enterprises did not overrule those settled precedents. Rather, the four-Justice plurality in that case confirmed that to prevail on a due process theory, a plaintiff must show that retroactive legislation is "arbitrary and irrational." 524 U.S. at 537 (plurality opinion) (quoting *Turner Elkhorn*, 428 U.S. at 15). Justice Kennedy, who concurred in the judgment and dissented in part, applied that traditional rational-basis test by stating that "due process requires an inquiry into whether in enacting the

retroactive law the legislature acted in an arbitrary and irrational way," and he concluded that the legislation at issue there bore "no legitimate relation to the interest which the Government asserts in support of the statute." *Id.* at 547, 549; see *id.* at 547 (noting that those "[a]ccepted principles" were "sufficient to dispose of the case").[1] Justice Breyer's dissent similarly explains that the Due Process Clause "safeguards citizens from arbitrary or irrational legislation." *Id.* at 556.

Moreover, petitioners err in attempting to draw a sharp distinction between rationality and fairness. It is precisely because "[r]etroactive legislation presents problems of unfairness" that such legislation must further "a legitimate legislative purpose * * * by rational means." *Romein*, 503 U.S. at 191. Thus, when Justice Breyer explained in his *Eastern Enterprises* dissent that "as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary," 524 U.S. at 557, he was simply stating that fair-ness can be relevant to rational-basis review. Significantly, petitioners cite *no* decision of *any* court that has adopted their novel view of *Eastern Enterprises* or the Due Process Clause.

ii. In any event, the legislation at issue here, which retroactively changed a retroactive change, would satisfy

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[1] Although Justice Kennedy has described his separate opinion in *Eastern Enterprises* as calling for "heightened scrutiny for retroactive legislation under the Due Process Clause," *Kelo* v. *City of New London*, No. 04-108, 2005 WL 1469529, at *12 (June 23, 2005) (Kennedy, J., concurring), that statement apparently refers to the traditional rational-basis scrutiny applicable to all retroactive legislation, because Justice Kennedy has also emphasized that the standard he advocated in *Eastern Enterprises* is "permissive" and violated only in "rare instances." *Lingle* v. *Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2087 (2005) (Kennedy, J., concurring) (quoting *Eastern Enters.*, 524 U.S. at 550 (opinion of Kennedy, J.)).

any plausible legal standard. Petitioners do not deny that Congress had a rational basis for amending Section 640. As the lower courts explained, Congress rationally concluded that it should equalize the limitations period for most public and private sector workers filing FLSA overtime claims, both out of "fairness" and in light of competing demands on the federal budget. 04-1225 Pet. App. 61a, 83a-85a.

Petitioners' contentions regarding fundamental fairness ignore the context of the legislation. It was only *after* petitioners filed their administrative claims that Congress enacted the two relevant statutes. The first statute retroactively extended the limitations period for such claims; the second partially repealed that retroactive extension as applied to workers who had already received some overtime compensation for the hours at issue. See pp. 5-6, *supra*. Although petitioners focus solely on the second statute, the combined effect of the two retroactive statutes was to leave petitioners no worse off (and in some respects better off) than when they performed the relevant work and filed their claims. There is nothing "fundamentally unfair" about that.

b. Petitioners nonetheless assert that laws shortening statutes of limitations are "essentially *per se* violations of Due Process unless they provide a reasonable prospective grace period in which claimants who would otherwise be barred can file their claims." 04-1226 Pet. 21; see *id.* at 22 & n.12 (citing, *e.g.*, *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 n.23 (1983)). That contention has nothing to do with this case because the 1994 and 1995 statutes only affected claims that had already been filed. The 1994 legislation was expressly limited to "claims filed before June 30, 1994" (three months before the statute's enactment), and the 1995 legislation only repealed in part the 1994 legislation. See pp. 5-6, *supra*. Because Congress expressly limited the statutes to already-filed

claims, a grace period for unfiled claims would have been meaningless.

Moreover, all of the cases on which petitioners rely involve limitations periods for judicial claims. It is far from clear that Congress is similarly constrained in adjusting the limitations period for administrative filings while leaving the period for substantially identical claims in a judicial forum wholly unaffected, particularly where its purpose is to correct past mistakes and it leaves the "net" limitations period for administrative claims essentially the same. See generally *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378-379 (1940); *Graham* v. *Goodcell*, 282 U.S. 409, 429 (1931).

c. Petitioners' contention (04-1226 Pet. 23) that "it is a *per se* violation of the Fifth Amendment for the United States to abrogate its own debts," is likewise misplaced. Indeed, that argument merely repackages petitioners' takings claims in due process terms. Petitioners rely on cases that involved challenges to the government's legislative repudiation of specific contractual agreements, such as agreements to redeem bonds or pay insurance proceeds. See *id.* at 22-23 (citing, *e.g.*, *Perry*, *supra*; *Lynch*, *supra*). Those cases are irrelevant because the retroactive repeal of the retroactive extension of the administrative limitations period at issue here did not violate any contract, as explained above. See pp. 12-16, *supra*.[5]

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[5] There is no property interest that could give rise to a due process claim in this case because, as explained above, petitioners had no property interest in Section 640's retroactive extension of the limitations period for administrative claims. See pp. 12-21, *supra*. As the D.C. Circuit recognized, however, that question need not be reached in this case, because even assuming *arguendo* that the Due Process Clause is implicated, Congress's amendment of Section 640 satisfies rational basis review. See 04-1225 Pet. App. 61a; p. 25, *supra*.

3. Petitioners' contention (04-1225 Pet. 28-29) that "[t]his case presents questions of great national importance" rests on their mistaken premise that "[t]he Federal Circuit held that the United States can retroactively abrogate its obligations." The practical significance of this case is likely limited to government employees, because government contractors and others who do business with the government typically enter into contractual relationships with the government, and are therefore protected by the Takings Clause. See p. 12, *supra*. Even with respect to the affected government employees, the combined effect of the 1994 and 1995 legislation was to give petitioners *greater* rights than they would have had under the statutes in effect at the time they performed the relevant work and filed their claims. See p. 15, *supra*. Thus, the government has not sought to abrogate its debts, as petitioners repeatedly contend (*e.g.*, 04-1225 Pet. 2-3; 04-1226 Pet. 25).

In contrast, petitioners' position would deprive Congress of needed flexibility, because it would mean that Congress could not unilaterally extend a benefit with confidence that it could later withdraw that benefit in light of changed circumstances or second thoughts. That could make Congress less inclined to extend new benefits, and it would represent a significant intrusion into Congress's authority to legislate in the public interest.

Petitioners' contentions (04-1226 Pet. 12, 13) that the combined holdings of the Federal and District of Columbia Circuits produce an "egregious whipsaw," and lead to a result that no member of the *Eastern Enterprises* Court would have approved, is particularly misplaced. If Congress had actually sought to extinguish its obligation to pay earned wages to federal employees, a more difficult due process question would be presented, and the fairness concerns raised by the concurring and dissenting opinions

in *Eastern Enterprises*—concerns that were expressed in the context of rational-basis review, see pp. 23-24, *supra*—would be more pronounced. But nothing in any of the *Eastern Enterprises* opinions can reasonably be read to suggest that Congress can not retract an administrative benefit it unilaterally provided *after* the relevant work had been completed.

Although petitioners note that the Federal Circuit has exclusive jurisdiction over some takings claims (04-1225 Pet. 29-30), that circuit does not have exclusive jurisdiction over all takings challenges to government actions. See, *e.g.*, *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 428, 430 (3d Cir. 2004) (adjudicating takings challenges to administrative regulation), cert. denied, No. 04-1020, 2005 WL 229245 (June 13, 2005); *Pittston Co.* v. *United States*, 368 F.3d 385, 405-406 (4th Cir. 2004) (adjudicating takings challenge to statute), cert. denied, 125 S. Ct. 1589 (2005). Nor does the Federal Circuit have exclusive jurisdiction over takings claims generally, as petitioners' allegation of a circuit split on the takings issue demonstrates. See 04-1225 Pet. 22 & n.21 (citing decisions from seven circuits). Due process issues likewise arise in the regional circuits, as shown by the D.C. Circuit's adjudication of petitioners' due process claim. Thus, the absence of a circuit split weighs strongly against further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

STEPHEN S. ADAMS AND 14,302 OTHER SIMILARLY SITUATED PLAINTIFFS,

PETITIONERS,

V.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Petitioners have addressed the Takings issues in a separate reply filed in No. 04-1225, and respectfully suggest that this Court review that reply first.

On the Due Process issues, the brief in opposition engages in an elaborate semantic game. As the petition explained, five Justices of this Court agreed in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), that laws imposing severely retroactive burdens violate Due Process unless they are fundamentally fair. Because the other four Justices would have held that such laws are regulatory Takings under a similar fairness analysis, this Court *unanimously* agreed that fundamentally unfair retroactive laws are unconstitutional. The United States concedes this, as it must. It nonetheless insists that *Eastern Enterprises* did not change the law in any respect, and that therefore there is no jurisprudential uncertainty for this Court to clarify, because such "fundamental fairness" scrutiny is nothing more than ordinary rational basis review. Opp. 23-24.

That conclusion is untenable. Although Justice Kennedy and the dissenting Justices in *Eastern Enterprises* explained that the test they applied could be reconciled with this Court's prior Due Process precedents, that analysis plainly was not rational basis review as it is conventionally understood. Indeed, the opposition is forced to concede in a footnote that just a few weeks ago Justice Kennedy described the test he applied in *Eastern Enterprises* as "'heightened scrutiny for retroactive legislation under the Due Process Clause.'" Opp. 24 n.4 (quoting *Kelo v. City of New London*, No. 04-108, 2005 WL 1469529, at *12 (U.S. June 23, 2005) (Kennedy, J., concurring)). The ordinary rational basis test as understood and applied by this Court and the lower courts asks only whether the law is *rationally* related to some legitimate state purpose. Fundamentally unfair retroactive legislation abrogating the United States's

debts is always *rational*—since it saves the government money.

The petition also pointed out that ordinary rational basis review should not have been applied in this case for two independent reasons. First, this Court has consistently held that laws retroactively shortening limitations periods are *per se* Due Process violations unless they provide a grace period for claims not yet filed. The United States's only response is that a grace period would have been useless here because these claims had already been filed. That assertion is outrageous. If retroactively reducing a limitations period violates Due Process unless potential claimants are given a fair chance to file, then retroactively barring claims *that have already been filed* is an even more glaring violation.

Second, the petition pointed out that the deference implicit in ordinary rational basis review is inappropriate when the principal (or, as in this case, exclusive) effect of legislation falls upon the United States's own proprietary obligations. On that point the brief in opposition simply relies on its Takings arguments, which petitioners have discussed in detail in their separate reply in 04-1225.

Petitioners submit that, under the appropriate heightened standard of review, the 1995 statute retroactively shortening their limitations period violated Due Process. Regardless, the obvious confusion about the appropriate standard merits review by this Court.

1. The United States argues (Opp. 23-24) that the reasoning of Justice Kennedy and Justice Breyer in *Eastern Enterprises* is fully consistent with prior Due Process law, because they concluded that "a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary," 524 U.S. at 557 (Breyer, J., dissenting), and this Court has always said that a law that is "arbitrary and irrational" violates Due Process, *e.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The problem

with such reasoning is that, although there were certainly hints of fundamental fairness review in this Court's prior retroactivity cases, the meaning that this Court actually gave to the phrase "arbitrary and irrational" was that a law passes muster so long as it is rationally related to a legitimate state purpose. *See* Pet. at 14-15 n.9.[1] That is certainly how the lower courts have understood the phrase, and it is the test that the D.C. Circuit applied in this case.

The opposition protests that there is no "sharp distinction between rationality and fairness," Opp. 24, but that is either plainly incorrect or another semantic exercise. If by "rationality" the United States means the conventional "rationally related to a legitimate state purpose" test, the distinction is razor sharp. A law is rationally related whenever it may advance a legitimate state purpose—*i.e.*, so long as it is not obviously incompetent or totally unrelated to any conceivable legitimate purpose. That is why judicial decisions invalidating economic legislation under the rational basis test are so extraordinarily uncommon. But laws can be *effective* without being *fair*.

The facts of *Eastern Enterprises* demonstrate the distinction. Congress's stated intention, providing health benefits to coal industry retirees, was certainly legitimate. And the means Congress chose to achieve its objective, imposing financial liability on former employers of the retirees, was a rational and effective means to that end. If the ordinary rational basis test had applied, that would have ended the analysis. Instead Justice Kennedy emphasized that Eastern "was not responsible for [the retirees'] expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." *Eastern Enterprises*, 524 U.S. at 550

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[1] "Pet." references in this reply refer to petition No. 04-1226, while "Pet." references in petitioners' other reply refer to petition No. 04-1225.

(Kennedy, J., concurring). And the dissenters asked whether the Coal Act, effective or not, was an "unfair allocation of public burdens ...." *Id.* at 558 (Breyer, J., dissenting).

Justice Kennedy and the dissenters in *Eastern Enterprises* argued that none of this Court's prior opinions would have to be overruled in order to announce a fundamental fairness test of that nature for retroactive legislation. And the United States seems to have embraced that test, at least for purposes of this case. But the lower courts do not have the liberty to follow hints woven through this Court's opinions; until this Court holds otherwise, they remain bound by the ordinary rational basis test that takes no account of fairness concerns. Although the opposition chides petitioners for "cit[ing] *no* decision of *any* court that has adopted their novel view of *Eastern Enterprises* or the Due Process Clause," Opp. 24, that was precisely petitioners' point. If the fundamental fairness analysis embraced unanimously by the Justices of this Court in *Eastern Enterprises* is to become the law, it will require a decision from this Court that (unlike *Eastern Enterprises* itself) actually contains such a holding.

2. There is of course room for reasonable disagreement about what Due Process and Takings law are or should be in the wake of *Eastern Enterprises*. The whipsaw currently at work in the lower courts, however, makes no sense at all. The Federal Circuit has built an entire jurisprudence of monetary Takings around the proposition that five Justices of this Court concluded in *Eastern Enterprises* that no law "impos[ing] an obligation to pay money" can be a Taking. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002). But the reasoning of those five Justices under the Takings Clause was inextricably intertwined with their conclusion that fundamental fairness review would be available under

the Due Process Clause. Indeed, as petitioners explained in their Takings petition (04-1225, at 20-23), the best way to understand the conclusions of Justice Kennedy and the dissenters in *Eastern Enterprises* is that regulatory Takings scrutiny under the test in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), would have been essentially redundant in light of the Due Process analysis they employed. And since the lower courts have (properly) declined to find any binding Due Process holding in *Eastern Enterprises*, the fact that the Federal Circuit has (improperly) found a Takings holding there opens the door to absurd consequences. For example, if it were challenged tomorrow the Coal Act itself would be immune from Takings scrutiny in the lower courts and would be subjected to nothing more searching than minimum rationality review (which it surely passes) under the Due Process Clause.

The United States protests that the Federal Circuit's jurisdiction over Takings claims is not quite exclusive. Opp. 28. But the Federal Circuit does have exclusive jurisdiction over substantial Takings claims for monetary compensation against the United States. Since the United States itself insists that the Federal Circuit's holding in this case is "likely limited to [federal] government employees," Opp. 27, it cannot credibly contend that this confusion will be resolved by non-federal cases in other circuits without this Court's intervention.

3. Petitioners believe that the best way to harmonize Due Process and Takings jurisprudence in this area would be to hold that laws abrogating the United States's financial obligations are *per se* Takings. If this Court chooses to apply a fundamental fairness test under the Due Process Clause, however, it should hold that the 1995 amendment to Section 640 denied petitioners Due Process.

The opposition concedes that "if Congress had actually sought to extinguish its obligation to pay earned wages to federal employees, . . . the fairness concerns raised by the concurring and dissenting opinions in *Eastern Enterprises* . . . would be more pronounced." Opp. 27-28. That is exactly what Congress both sought to do, and did. Congress identified a significant sum of money that the United States owed to petitioners ($460 million according to Rep. Lightfoot), determined that it would not honor this obligation "for work done many years ago," 141 Cong. Rec. 32,597 (1995), and therefore modified the statute of limitations to extinguish petitioners' claims. The fact that Congress chose to avoid its obligation by reducing the statute of limitations instead of by canceling the underlying debt is immaterial. As explained in petitioners' separate reply in 04-1225, at 7-8, abrogating a debt and rendering it unenforceable are identical for Takings purposes.

Under the standards for retroactive legislation articulated by Justice Kennedy and the dissenters in *Eastern Enterprises*, the 1995 statute also violates Due Process.[2] That statute was not remedial in any sense, because petitioners did not owe anything to the United States that required compensation. In the same vein petitioners were in no sense responsible for the budgetary shortfall that the statute sought to remedy. The effect of the 1995 amendment was undoubtedly severe, in that it nullified a lawful debt of the United States to petitioners for unpaid wages for work already performed. It therefore represents "an unfair allocation of public burdens through

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[2] Petitioners acknowledge that Section 640 would survive ordinary rational basis scrutiny. To further the "legitimate" legislative purpose of achieving a $460 million cost savings for the treasury, Congress took the "rational" step of identifying the debt obligation owed to petitioners and modifying the statute of limitations in order to eradicate that debt.

.... specially arbitrary retroactive means." *Eastern Enterprises*, 524 U.S. at 558 (Breyer, J., dissenting).

The opposition argues that the amendment was fair because it equalized the limitations period for private and public sector employees. That is far too simplistic. There are many differences between government and private employment, and private sector employees have the better of those differences on many points. But, as part of the overall package that induced them to work for the United States, petitioners were given an administrative process and assured by GAO and OPM that they would have six years to seek any unpaid overtime through that process. Even if that assurance was wrong, and the limitations period did run on petitioners' claims, Congress and the President recognized the patent injustice involved and agreed to honor claims already filed notwithstanding the limitations bar. It has been settled contracts law for centuries that a promise to honor a debt otherwise barred by a statute of limitations is binding, even in the absence of consideration, and cannot be revoked. *See* Reply to 04-1225, at 3-4 & n.2. Fundamental fairness requires the same result here.

4. Petitioners also pointed out (Pet. 22 n. 12) that laws retroactively shortening a statute of limitations are *per se* Due Process violations unless they provide a reasonable grace period for claims that have not yet been filed. The opposition concedes such settled law, but argues that since the retroactive amendment here was "limited ... to already-filed claims, a grace period for unfiled claims would have been meaningless." Opp. 25-26. That argument completely misses the point. The thrust of cases like *Atchafalaya Land Co. v. F.B. Williams Cypress*, 258 U.S. 190 (1922), is that claimants rely on limitations periods when deciding when to file their claims—and therefore it is profoundly unfair to shorten a limitations period without sufficient notice to those that have not yet filed. Retroactively shortening the

period for those who *have already filed*, and dismissing their claims on that basis, is far worse, not better. If a grace period of zero is *per se* unconstitutional, a grace period of *minus four years* is an outrage. That is exactly what happened here.

The opposition also suggests that the *Atchafalaya* principle should not be extended to limitations periods in administrative proceedings, but the cases it cites are not germane. Opp. 26. And the basic point underlying *Atchafalaya* is equally true in administrative proceedings as in court. Assuring someone that they have a certain period in which to vindicate their rights, and then pulling the rug out from under them by changing the rules retroactively, is unfair in any federal forum.

5. The petition also explained that the deference to legislative judgment implicit in the rational basis test is inappropriate "where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations." *United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996) (plurality op.); Pet. 22-24. The opposition's only response is to argue that the 1995 amendment did not affect any contractual obligation of the United States. That is incorrect for reasons explained in detail in petitioners' separate reply on the Takings issues. Petitioners *do* have contractual rights against the United States, under unilateral contract principles familiar to first year law students and explained by this Court in *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885).

But even setting aside whether the *Winstar* principle applies directly to this case, petitioners' broader point was that the practical problem this Court struggled with in *Winstar* under contracts law is remarkably similar to the problems posed here under the Fifth Amendment. Many regulatory measures, including changes to limitations periods, will have an incidental effect on the government's